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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

CITY OF COLLEGE STATION, ALBERT MAYO, E. MURL BAILEY, VIOLETTA BURKE COOK, PATRICIA BOUGHTON, and JACK UPHAM,

Cross-Petitioners,

vs.

FRED B. SHELTON, III and JOHN PAUL JONES,

Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT UNDER RULE 19.5

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QUESTIONS PRESENTED FOR REVIEW

Does the limitation imposed by *Hughes v. Rowe*, 449 U.S. 5, on the awards of attorneys' fees under 42 U.S.C. § 1988 to prevailing defendants, that such awards may be made in only those cases in which the plaintiff's case is groundless or without foundation, apply when the unsuccessful plaintiff has, by a claim of denial of substantive process, tried to get a federal district court to function as a zoning review board?

Does the rule of *Hughes v. Rowe*, 449 U.S. 5, that awards of attorneys' fees under 42 U.S.C. § 1988 can be made to prevailing defendants only if the plaintiff's case is groundless or without fundation, proscribe an award of fees to defendants when the plaintiffs could not produce enough evidence to avoid having summary judgment entered against them?

THE PARTIES AND CORPORATE RELATIONSHIPS

The caption of the case in this Court, as set forth on the cover of this petition and at the beginning of the brief, lists all of the parties to the proceedings in the Court of Appeals for the Fifth Circuit whose judgment is sought to be reviewed. The only corporation which is a party is the municipal corporation, The City of College Station, which has neither parents, subsidiaries nor affiliates.

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In The

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CITY OF COLLEGE STATION, ALBERT MAYO, E. MURL BAILEY, VIOLETTA BURKE COOK, PATRICIA BOUGHTON, AND JACK UPHAM,

Cross-Petitioners,

vs.

FRED B. SHELTON, III and JOHN PAUL JONES,

Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI UNDER RULE 19.5

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit which is sought to be reviewed by this Petition was entered on January 6, 1986. This Petition is filed under Rule 19.5 as a cross-petition to be granted only if the Petition heretofore filed by Fred B. Shelton, III, and John Paul Jones, Docket No. 85-1846, is granted. On March 17, 1986, Justice White signed an Order extending the time for Shelton and Jones to file their Petition for Certiorari to and including May 6, 1986. Cross-petitioners first received the Petition for Certiorari in No. 85-

1846 on May 9, 1986. It is believed that this Court has jurisdiction to review the judgment of the Court of Appeals for the Fifth Circuit by Writ of Certiorari under the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 14, United States Constitution

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> • • •
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE, TITLE 42:

§ 1983 Civil Action For Deprivation Of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in

equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 1988 Proceeedings in Vindication of Civil Rights; Attorneys fees

* * *

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 or title VI of the Civil Rights Act of 1964, the court in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

———o———

STATEMENT OF THE CASE

Cross-respondents sued cross-petitioners, a small Texas city, its City Planner and four members of its zoning board of adjustment (ZBA), alleging that the failure of the ZBA to grant them variances denied them property without due process of law. The variances, if granted, would have permitted cross-respondents to operate businesses without complying with the provisions of the City's zoning ordinance requiring businesses to furnish off-street parking. Cross-respondents alleged that the denial of the variances denied them both substantive and procedural due process, and that that gave them a right of action under 42 U.S.C. § 1983. Cross-respondents invoked the jurisdiction of the District Court under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3)(4).

Cross-petitioners moved for and were granted summary judgment. After the Court announced that it would grant summary judgment, cross-petitioners moved for an award of attorney's fees under 42 U.S.C. § 1988. The District Court ruled that cross-petitioners were not entitled to recover attorneys' fees because "the applicable legal standards as set forth in *Hughes v. Rowe*, 449 U.S. 5 (1980) and cases cited therein have not been met . . . ."[1] Cross-respondents appealed to the Court of Appeals for the Fifth Circuit seeking reversal of the summary judgment against them. Cross-petitioners cross-appealed from the portion of that judgment denying them attorneys' fees. A panel of the Court of Appeals reversed the judgment of the District Court. The Court of Appeals en banc reversed the panel and affirmed the judgment of the District Court, with ten judges joining the opinion for the Court and five dissenting.

The majority opinion rejected the claim for attorney's fees saying that even though cross-respondents' constitutional claims had been rejected "we are persuaded that this suit was not frivolous, unreasonable or without foundation." Citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S.Ct. 694,700, 54 L.Ed.2d 648 (1978). (780 F.2d at 486, Pet. 25A).

Cross-respondents have filed a petition asking this Court to issue a writ of certiorari to review the opinion and judgment of the Court of Appeals for Fifth Circuit. It is docket No. 85-1846. Cross-petitioners have urged

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[1] The district court's judgment containing that statement is reproduced as Appendix A to this Petition.

that certiorari be denied, but are filing this petition under the provisions of Rule 19.5 of this Court asking that if the Court should grant the petition in No. 85-1846, that it also grant this petition.

———o———

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Fifth Circuit has decided, almost *sub silentio,* two important questions of law which have not been but should be settled by this Court:

I. Whether the language in the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, "the court . . . may allow the prevailing party . . . a reasonable attorney's fee . . . " should be interpreted to bar awards to prevailing defendants in cases in which the unsuccessful plaintiffs claim that decisions by zoning boards of adjustment deny them property without due process of law.

II. If the rule of *Hughes v. Rowe,* 449 U.S. 5 is to be applied to limit awards of attorney's fees to defendants who prevail against claims that zoning board actions denied substantive due process, what factual basis is required to establish that such a claim is "meritless in the sense that it is groundless or without foundation?"

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SUMMARY OF THE ARGUMENT

The factors which led the Court to say in *Christiansburg Garment Co. v. EEOC* that attorney's fees should be awarded under the Civil Rights Act of 1964 to a prevailing defendant only when the plaintiff's case was frivolous, unreasonable or without foundation, and in *Hughes v. Rowe* that fees would be awarded to a defendant under 42 U.S.C. 1988 only when the plaintiff's case is groundless or without foundation, are not present when the case is one in which a disappointed landowner seeks to have a federal court function as a zoning board of review. In such cases the underlying considerations, as well as the wording of the statute, indicate that at least defendants should be treated the same as plaintiffs.

The *Hughes v. Rowe* standards need to be clarified. The lower Courts act as though they cannot award attorney's fees to a prevailing defendant unless they find that the plaintiff's case was frivolous, unreasonable *and* without foundation, and refuse to accept complete lack of factual support for a plaintiff's claim as sufficient reason to award fees to a prevailing defendant.

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ARGUMENT

I. Introduction.

Cross-petitioners clearly were the prevailing parties in both the District Court, which gave them a summary judgment, and the Court of Appeals, which affirmed that judgment. Cross-respondents claimed that their action

was based on 42 U.S.C. § 1983. Nevertheless, despite what appears to be unambiguous language in the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, "in *any* action . . . to enforce a provision of sections . . . 1983 . . . the court in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fees as a part of the costs" (emphasis added), both the District Court and the Court of Appeals said that Cross-petitioners were not entitled to attorney's fees.

Neither court discussed the questions involved. The District Court's only explanation was "[T]he court . . . is of the opinion that the applicable standards as set forth in *Hughes v. Rowe,* 449 U.S. 5 (1980) and cases cited therein have not been met, and therefore defendants are not entitled to recover attorney's fees.[2]

The Court of Appeals' only statement on this question is in Part IV of its opinion (780 F.2d at 486, App. 25A) where it says:

> While a majority of the Court has rejected the Constitutional claims, we are persuaded that this suit is not "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978). We therefore reject defendants' cross-appeal for attorneys' fees under 42 U.S.C. § 1988.

II. The Rationale of Christiansburg Garment Co. v. EEOC, Adopted In Hughes v. Rowe, Does Not Apply To This Case.

Hughes v. Rowe, 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) on which the District Court relied, arose from

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[2] See Appendix A.

the claims of a state prisoner based on 42 U.S.C. § 1983 that prison officials had denied him due process of law in a disciplinary action. The prisoner's *pro se* petition was dismissed by the District Court for failure to state a constitutional violation. The District Court then awarded the state attorney general attorney's fees when the prisoner failed to respond to an order that he show cause why such fees should not be awarded. The Circuit Court affirmed without a written opinion. This Court found that one of the claims in the prisoner's complaint stated a case on which relief might be granted and remanded for further proceedings.

The Court might then have disposed of the attorney's fees question on the basis that the prison officials were not then the prevailing parties, Cf. *Hanranhan v. Hampton,* 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980), but it chose to rule that the standards adopted in *Christiansburg Garment Co. v. EEOC, supra,* for the award of attorney's fees in an action under Title VII of the Civil Rights Act of 1964, should be applied. The Court's opinion in *Hughes v. Rowe* does not discuss the rationale of *Christiansburg.* It merely says that the Court could perceive no reason for applying to 42 U.S.C. § 1988 a different standard than was applied in that case.

Cross-petitioners submit that a reason for applying different standards is demonstrated by the facts of this case. They urge the Court, if it grants the petition in No. 85-1846, to grant this petition so that it may determine whether that reason is an adequate one, and if so what standard for awards of attorney's fees to prevailing Defendants should be applied in cases such as this.

The difference between this case on one hand, and *Christiansburg Garment Co., Inc. vs. EEOC, supra,* and *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) on which *Christiansburg* relies for much of its rationale, on the other hand, is in the presence or absence of interest of the Congress in seeing that the claims of the type asserted by the plaintiffs are encouraged or not discouraged. In those cases the Court concluded: (1) because plaintiffs asserting claims under titles II and VII of the Civil Rights Act of 1964 would be acting as private attorneys general, enforcing for the benefit of the public generally provisions of law which Congress believed to be of the highest priority, fees awarded to prevailing plaintiffs in such cases would be awarded against defendants who had violated the law, and awards of fees of prevailing plaintiff would induce the filing of claims for persons who could not finance litigation, prevailing plaintiffs in those cases should be awarded attorney's fees unless special circumstances would make it unjust;[3] but, (2) even though Congress intended that fees be awarded to prevailing defendants in such cases to deter the bringing of lawsuits which had no foundation, because the danger that such awards would tend to deter plaintiffs from attempting to enforce the provisions of the law that Congress wanted

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[3] In the recent case *Evans v. Jeff D.,* — U.S. —, 54 LW 4359 (April 21, 1986) Part II of the dissenting opinion of Justice Brennan contains an extensive review of the cases in which the courts have concluded from the legislative history that the Congress intended the Civil Rights Attorney's Fees Awards Act to induce counsel to take cases in which they would act as private attorneys general to enforce the Civil Rights laws which the Congress wanted to have enforced.

enforced, fees would be awarded to a defendant only on a finding that the plaintiff's action was frivolous, unreasonable or without foundation.

That rationale was quite appropriate for the cases arising under the Civil Rights Act of 1964. The adoption of the same standards for § 1988, as was done in *Hughes v. Rowe, supra,* where no congressional interest could be inferred because the claim was not based on legislation (other than that creating the remedy) but on an alleged constitutional tort, is probably not subject to criticism. Fees may be awarded, or withheld, in the exercise of the Court's discretion when the action involved is one that the Courts want to encourage or discourage. Cf. *Roadway Express, Inc. v. Piper* 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980).

But, it is submitted, none of those reasons for awarding fees to plaintiffs or denying them to defendants are present in this case. To the extent that similar factors are present, they tend to encourage awards of attorney's fees to prevailing defendants. The suit is not what will be normally called a Civil Rights case. It was brought under a Civil Rights Statute only by a Procrustean adjustment of the claim. If the plaintiffs had won only they would have benefited. The general public, at least those living in College Station, would have been injured. What sentiment there is in either the Congress or the Courts is to discourage bringing in Federal Courts these suits that belong in the State Courts. Consequently, standards for the award of attorney's fees which encourage the bringing of this type of suit in Federal Courts

are inappropriate. If anything, the standard should discourage the filing of this type of suit in federal courts.

Cross-petitioners submit that if the Court should grant the petition in No. 85-1846 it should also grant this petition to consider whether, as to cases where the Plaintiffs' only claim to federal jurisdiction is a contention that a zoning decision denied them property without due process of law, standards for the award of attorney's fees different than those in Civil Rights cases should be applied. Cross-petitioners further submit that standards in keeping with the usual rule for the construction of statutes "absent a clear indication of legislative intent to the contrary, the statutory language controls its construction." *Ford Motor Credit Co. v. Cenance,* 452 U.S. 155, 158 fn. 3, 101 S.Ct. 2239, 2241 fn. 3, 68 L.Ed.2d 744 (1981) would be appropriate.

III. The Teachings Of Hughes v. Rowe Need Clarification.

In *Hughes v. Rowe, supra,* this Court adopted the standards for awarding attorney's fees under 42 U.S.C. § 1988 that it had fashioned for cases under the Civil Rights Act of 1964. It quoted from *Christiansburg Garment Company v. EEOC, supra,* and adopted as the principle applicable for § 1988 cases:

> [T]he defendant in an action brought under Title VII of the Civil Rights Act of 1964 may recover attorney's fees from the plaintiff only if the District Court finds "that the Plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."

449 U.S. at 14, 101 S.Ct. at 178.

After making the statement discussed in the prior section of this argument, that no reason could be perceived for applying a less stringent standard to 42 U.S.C. § 1988 cases, this Court said:

> the Plaintiff's action must be meritless in the sense that it is groundless or without foundation.

449 U.S. at 14, 101 S.Ct. at 178.

Although that statement by the Court is clearly in the disjunctive, many Courts have done as the District Court and Circuit Court in this case did, and have not accepted lack of a factual basis for the Plaintiff's claim as adequate grounds for awarding attorney's fees to the prevailing defendant. Some courts have found that an award of attorney's fees under § 1988 to a prevailing defendant was or might be proper, see e.g. *Church of Scientology of California v. Cazares*, 638 F.2d 1272 (5th Cir. 1981); *Patzkowski v. United States*, 576 F.2d 134 (8th Cir. 1978); *Prochaska v. Marcoux*, 632 F.2d 848 (10th Cir. 1980) *cert. den'd.* 451 U.S. 984. However, even these cases seem to treat the statement in *Christiansburg*, that before attorney's fees can be awarded to a prevailing Defendant, the Court must find that the Plaintiff's action was "frivolous, unreasonable or without foundation," as though the standards were listed in the conjunctive rather than the disjunctive. They also seem to ignore the explanatory sentence in *Hughes v. Rowe*, "the Plaintiff's action must be meritless in the sense that it is groundless or without foundation."

Cross-petitioners argued to both the District Court and the Court of Appeals that a ruling that a summary

judgment was proper made inevitable a finding that the Plaintiffs/Cross-respondent's case was factually "groundless or without foundation." Both Courts wrote off that argument with a single citation. Neither discussed the reasoning by which it determined that the contention was not correct.

Cross-petitioners submit that either (1) the language in *Hughes v. Rowe* does not mean what Cross-petitioners read it to say, i.e., that "groundless or without foundation" means at least lack of factual support, so that the absence of evidence to support a claim makes appropriate an award of attorney's fees to a prevailing defendant; or (2) the lower Courts are misinterpreting that language, or refusing to be guided by the teachings of the case.

Cross-petitioners urge that if the Court should grant the petition in No. 85-1846, it also grant this petition and make clear what makes a case "groundless or without foundation" so that the bar and the lower courts will know what factual situations make an award of attorney's fees to a prevailing defendant appropriate.

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CONCLUSION

If the Court should grant the Petition for Certiorari in No. 85-1846 it should also grant this petition and clarify the standards to be used in determining whether under 42 U.S.C. 1988 an award of attorney's fees should be made to a prevailing Defendant.

Respectfully submitted,

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APPENDIX

Appendix A hereto is the Judgment entered December 19, 1983, in the United States District Court for the Southern District of Texas, Houston Division, in Civil Action No. H-81-2044, *Fred Shelton, III, et al. v. City of College Station, et al.* This is not reproduced in the Appendix to the Petition of *Fred B. Shelton, et al. v. City of College Station, et al.*, No. 85-1846.

The items which appear in the Appendix to the Petition for Writ of Certiorari filed by *Fred B. Shelton, III, and John Paul Jones v. the City of College Station, et al.*, No. 85-1846, are not reproduced here. Cross-petitioner respectfully requests the Court to refer to the appendix to the petition in No. 85-1846 for the following items:

(1) The opinion of the United States Court of Appeals for the Fifth Circuit, sitting *en banc*, filed January 6, 1986, reproduced pp. 1A-37A.

(2) The opinion of a panel of the Court of Appeals for the Fifth Circuit dated March 11, 1985, in *Fred B. Shelton, et al. v. City of College Station, et al.*, reproduced pp. 38A-52A.

(3) The transcript of the proceedings on October 14, 1983, in the United States District Court for the Southern District of Texas, Houston Division, before the Hon. Norman W. Black, Judge, in the case entitled *Fred B. Shelton, III, et al. v. The City of College Station, et al.*, reproduced pp. 53A-59A.

(4) The Judgment on Rehearing *en Banc* entered by the United States Court of Appeals for the Fifth Cir-

cuit January 6, 1986, in *Fred B. Shelton, III, et al. v. The City of College Station, et al.*, reproduced pp. 60A-61A.

(5) Article 1011G of the Texas Revised Civil Statutes of 1925, as amended, reproduced from Vernons Texas Revised Civil Statutes Annotated (1983 and supplement for 1986) pp. 62A-66A.

(6) Zoning Ordinance No. 850 of the City of College Station, Texas reproduced on pp. 67A-72A.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-2044

FRED SHELTON, III, et al.,

Plaintiffs

vs.

CITY OF COLLEGE STATION, et al.,

Defendants.

JUDGMENT

(Filed December 19, 1983)

The Motion for Summary Judgment filed by the Defendants in this action came on for hearing before the Court on October 14, 1983. The Court having considered the Motions, briefs and factual data submitted in support of their motion by the Defendants, and the response, briefs and factual data submitted in opposition by the Plaintiffs, and the Court having heard the arguments of counsel and being of the opinion that such motion should be granted, announced from the bench its findings of fact and conclusions of law.

And the Court, having considered the Motion of Defendants' subsequently filed that they be allowed a reasonable attorney's fee to be taxed as costs and paid by Plaintiffs, is of the opinion that the applicable legal standards as set forth in *Hughes v. Rowe*, 449 U.S. 5 (1980) and cases cited therein have not been met, and

therefore Defendants are not entitled to recover attorney's fees.

It is, therefore, ORDERED, ADJUDGED, and DECREED that Defendants' Motion for Summary Judgment be, and the same hereby is, GRANTED, and that Plaintiffs take nothing in their action against Defendants. It is further

ORDERED, ADJUDGED, and DECREED that the Defendants have and recover from the Plaintiffs their costs, not to include attorney's fees.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 19th day of December, 1983.

/s/ NORMAN W. BLACK
UNITED STATES DISTRICT JUDGE